No. 9197

In the United States Circuit Court of Appeals for the Ninth Circuit

J. W. MALONEY, COLLECTOR OF INTERNAL REVENUE, PORTLAND, OREGON, APPELLANT

vs.

PORTLAND ASSOCIATES, INC., A CORPORATION APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

Brief For the Appellee

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CITATIONS

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BRIEF FOR THE APPELLEE

This appeal has been taken from a judgment entered January 7, 1939, in favor of the Appellee and against the Appellant to recover documentary stamp taxes assessed and paid. Said judgment is in the amount of $7,282.48, together with interest thereon at the rate of 6 per cent per annum from November 2, 1935, together with the further sum of $1,407.90, together with interest thereon at the rate of 6 per cent per annum from February 16, 1937, together with costs and disbursements in the amount of $31.06 (R. 108-109).

The Appellee does not entirely agree with the statements of the Appellant relative to the "questions presented" set forth on page 2 of Appellant's brief. We suggest the following statement as to the questions presented:

QUESTIONS PRESENTED

1. Whether or not there is a transfer of legal title to shares or certificates when voting trust certificates are purchased directly from voting trustees where no previous subscription or purchase or ownership was had of the capital stock and whether or not such a transaction results in a taxable transfer.

2. Whether or not there is any transfer of the right to receive voting trust certificates which would be taxable under the revenue statutes.

3. Whether or not there were options to purchase and if so, whether or not the same is taxable under the revenue statutes.

STATUTES AND REGULATIONS INVOLVED

Appellant has included as an appendix to his brief certain statutes and regulations but inasmuch as all of the statutes and all of the regulations which have reference to this matter are not included in Appellant's brief, we are including as an appendix to this brief those statutes and regulations which we believe to be applicable.

By stipulation (R 164-165) the 1926 Print of Regulations 71 of the Treasury Department may be accepted by the Court in the event any reference thereto is necessary.

STATEMENT

The facts as found by the Court below (R 89-105) substantially set forth all of the facts necessary for this controversy.

SUMMARY OF ARGUMENT

1. Appellant's first contention is that there was a transfer of the right to receive the legal title to 155,000 shares of the taxpayer's corporate stock which tax was assessed in the amount of $3,100.00. The 155,000 shares are included within stock certificate No. 7 issued by the corporation to the voting trustees. Counsel for Appellant contend that in effect there was an implied issuance of this capital stock to the individuals who paid money for voting trust certificates and that such individuals impliedly transferred the shares of stock to the voting trustees.

The Appellee contends that such was not the arrangement between the parties, but that certain individuals purchased voting trust certificates from the voting trustees, and that the purchasers of voting trust certificates at no time had the right to receive the *legal title* to *shares of stock* in the corporation, except such right as they might have upon the termination of the trust, but any rights they had to receive the stock at the termination of the trust were not transferred to anyone. Such rights were always retained by the trust certificate holder as shown by the voting trust certificates and the voting trust agreement.

2. The Appellant contends that there was a transfer of the right to receive voting trust certificates which Appellant claims would be taxable.

The Appellee claims that there was no transfer of the right to receive voting trust certificates and even if there was a transfer of the right to receive voting trust certificates that such a transfer is not taxable under the revenue statute.

3. The Appellant contends that the Court below erred in holding that the purported options were not taxable.

The Appellee contends that the purported options do not rise to the dignity of being options, and even if they are options, they are not taxable under the revenue statute.

ARGUMENT

I.

There was no transfer of rights to subscribe for or receive the taxpayer's capital stock, when individuals purchased trust certificates from the voting trustees, and that there was no taxable transfer within the meaning of Schedule A-3 Title VIII *Revenue Act of* 1926 *as amended.*

Appellant's argument is premised upon facts which are contrary to what the record shows. On page 21 of Appellant's brief it is recited that "155,000 shares of the new no par value stock were subscribed for by various individuals." This is not in accordance with

the facts shown in the record. This same statement is mentioned on pages 22 and 24 of Appellant's brief.

In attempting to decide this case and with particular reference to the cases cited by the Appellant, the following points of importance should be kept in mind by the Court:

1. With relation to the voting trust agreement there was no consolidation of corporations or of corporate interests in connection with the formation of the voting trust agreement.

2. That the tax in this case is assessed only against the corporation. It is not assessed against the voting trustees, or against the Title and Trust Company as the agent of the voting trustees, and it is not assessed against any of the individual holders of voting trust certificates. (Defendant's Exhibits, 15, 16, 17, 18 and 19).

3. That capital stock in the corporation with respect to the 155,000 shares was never issued to any holders of the voting trust certificates but was only issued to the voting trustees and the original issuance tax paid. (R. 118, 137, 142, 144, 145, 146, 161, 163, 172, 184, 185).

4. That the corporation was not a party to the voting trust agreement. (Plaintiff's Exhibit 4-R. 187).

5. That the holders of the voting trust certificates did not subscribe for or purchase stock in the corporation but only purchased voting trust certificates (R. 134).

6. That the consideration for the purchase of said voting trust certificates was not paid to the corporation by the purchaser of voting trust certificates, but was paid to the voting trustees (R. 126, 136).

7. That no voting trust certificates were issued by the corporation but were issued only by the voting trustees, or by the Title and Trust Company as agent of the voting trustees (R. 114, 126, 127, 134, 136, 142, 144).

It should be kept in mind also by the Court that Schedule A3 of Title VIII of the Revenue Act of 1926, as amended, imposes a tax only upon the transfer of *legal title,* to any of the shares or certificates mentioned or described in sub-dibision (2). Sub-division 2 is known as Schedule A-2 of Title VIII of the said Revenue Act which is limited to shares or certificates of stock or of profits or of interest in property or accumulations by any corporation or by any investment trust or similar organization. The voting trustees in this instance did not come within the category of either a corporation or an investment trust, but in any event, this tax was not levied upon the voting trustees.

With respect to the 155,000 shares the record clearly shows that they were issued to the voting trustees and that no actual stock subscription in writing was taken by the corporation from the voting trustees or from any other person. A majority of the outstanding capital stock had been previously subscribed for and issued and the stamp taxes have been paid thereon,

but the 155,000 shares of stock were issued to the voting trustees upon the payment by the voting trustees of the amount required by the corporation to issue the same in accordance with the corporate resolutions. The voting trustees did not sell the shares of stock but they sold to prospective purchasers only voting trust certificates.

The fundamental facts in this case differ very greatly from those cases relied upon and cited by the Appellant.

The case of Raybestos-Manhattan, Inc., vs. U. S. 296 U. S. 60, did not even involve voting trust certificates but the transaction arose by reason of a consolidation of corporations and the court was unquestionably correct in holding that upon the consolidation there was a transfer of the right to subscribe for or receive shares or certificates of stock from the corporation.

In the case of Welch vs. Kerckhoff 84 Fed. (2d) 295, there was a transfer by an executor to a residuary legatee which was clearly a transfer of *legal title.*

Appellant apparently places great emphasis upon the case of Founders General Corporation vs. Hoey 300 U. S. 268. In that case there was a designation of a nominee to receive the stock which was to be issued. The Court pointed out that the nominee received no beneficial interest in the stock but nevertheless did receive the *legal title.* We believe the Court was correct in deciding that such a transfer was taxable under the statute.

In the case of Standard Oil Company of California vs. United States, 90, Fed. (2d), 571, there was a transfer of the right to receive stock in the corporation, upon a consolidation. No voting trust was involved.

The case of Burnett vs. Harmel, 287 U. S. 103, did not pertain in any way to stamp taxes and had no reference to the statutes involved in this case. The same is true of the case of New Colonial Ice Company vs. Helvering, 292 U. S. 435.

The cases of Consolidated Automatic Merchandising Corporations, 90 Fed. (2d) 598; United States vs. Vortex Company, 84 Fed. (2d) 925, and United States vs. Brown Fence and Wire Company 9 F. Supp. 1008, all declare the proper rule of there being a taxable transfer upon a consolidation of corporations. None of the aforementioned cases have any bearing upon the issues involved in this case, because the facts and issues were substantially different. In the first case, the corporation was also a party to the voting trust agreement.

The case of Ladner vs. Pennroad Corporation, 97 Fed. (2d) 10, did involve the issuance and transfer of voting trust certificates but in that case the subscribers or purchasers paid their money directly to the corporation which was the issuer of capital stock. In that case they did not purchase voting trust certificates from voting trustees as they did in the case at bar. In the opinion of the Court it was specifically pointed out as follows: "It will be noted that the

subscribers sent checks for the stock to the *Appellee* * * *"

It is obvious that when the purchasers or subscribers sent money to the corporation for *capital stock* they then became entitled to receive capital stock and the right to receive the capital stock was immediately transferred to the voting trustees. It is equally obvious that there would be no transfer of the right to receive if the voting trustees subscribed for or purchased the stock from the corporation and then sold only voting trust certificates.

In the case of United States vs. Baker (C.C.A. First Circuit), decided March 25, 1939, not reported, but which may be found in Commerce Clearing House 1939 Federal Tax Service, Volume 4, Page 9988, Paragraph 9423, there was not only the payment of money to the issuing corporation but there was an actual issuance of voting trust certificates by the voting trust to the corporation and the corporation subsequently sold the voting trust certificates which merely resulted in a transfer of voting trust certificates. The Appellee here does not contend that there is no tax upon a transfer of voting trust certificates. In fact the tax was assessed on many transfers of voting trust certificates which the taxpayer in this instance has acknowledged (R. 18, 19, 20, 21, 24). In the Baker case there was formed an investment trust which issued shares of stock. There was also created a common voting trust. The investment trust authorized the issuance of shares of stock to the

voting trustees in consideration of the issuance by the voting trustees to the investment trust of an equal number of shares represented by voting trust certificates. The investment trust authorized the issuance and transfer of voting trust certificates which it had acquired in the name of any purchaser of voting trust certificates which were sold to the public by the investment trust. It is specifically pointed out in the facts in that case that "on various days between April 9, 1927, and December, 1930, the investment trust, Plaintiff herein, exchanged their property or offered for sale and sold to the public, or numerous purchasers thereof for money, not less than 1,779,972 common shares of the voting trust. The voting trust certificates then sold by the investment trust were delivered to the voting trustees and were cancelled and new certificates were issued in the names of the purchasers. The Court pointed out that the only issue before it was whether or not the sale of the voting trust certificates by the investment trust to the public was a transfer, subject to the stamp tax. In its opinion the Court gave consideration to the case of White vs. Consolidated Equities, Inc., 78 Fed. (2d) 435, and did not attempt to overrule the decision, but merely pointed out the distinction. It also emphasizes that each case must depend on its own facts. With relation to the White case, the Court stated:

> "In the White case there was only one completed transaction in the way of a sale or transfer, and the corporation having paid the tax

> on that sale or transfer, it was under no obligation to pay a second tax; and, having been required to do so, could recover it back. But in the present case there were two taxable transactions: One when Investment Trust transferred its stock to the Voting Trust and received in exchange therefor voting trust certificates, upon which transaction Investment Trust paid a tax. The second transaction was when Investment Trust sold and through its depository delivered Voting Trust certificates to purchasers, which sale, by reason of the voting trust agreement, transferred an equitable right or interest in the stock of Investment Trust in the hands of the Voting Trust. * * * This second transaction being a sale or transfer of an equitable interest in the Investment Trust, such sale was also the subject of a tax."

The revenue statutes providing for a documentary stamp tax upon the issue or sale of capital stock is a tax upon the use of facilities. The statutes may be found in U. S. C. A., Title 26, Section 902. The Appellee here concedes that whenever the facilities are used which would be taxable under the statute, that the tax should be paid, but if a transaction occurs which does not use the particular facilities upon which the tax is imposed, then there should be no assessment or collection of the tax. See Nicol vs. Ames, 173 U. S. 509, Knowlton vs. Moore, 178 U. S. 41, Thomas vs. United States, 192 U. S. 363 and Billings vs. United States, 232 U. S. 261.

It is also a cardinal principal of law that in the construction of any statute and the application of the same to the facts of any case, if there is any doubt, that doubt should be resolved in favor of the taxpayer. Gould vs. Gould, 245 U. S. 151, Miller vs. Standard Nut Margarine Company, 284 U. S. 498, McFeely vs. Commissioner of Internal Revenue, 296 U. S. 102, Cincinnati Soap Company vs. United States, 22 Fed. Sup. 141, Empire Trust Company vs. Hoey, Collector, 22 Fed. Sup. 366.

With the above rules of law in mind the Court will note that the tax on transfers, as shown by schedule A-3 of the Revenue Act of 1926 is a tax upon the sale, agreement of sale, memoranda of sale or delivery of or transfer of *legal title* to shares or certificates of stock. The statute also includes rights to subscribe for or to receive such shares or certificates. The words "such shares or certificates" undoubtedly refer to stock or to the transfer of *legal title* to shares or certificates of *stock*. The statute does not in any manner cover voting trust certificates, and it does not cover transactions which might have been contemplated but which were never made, and it does not cover sales or transfers of an equitable interest in stock, but plainly refers to *"legal title"*. Under the evidence in this case the purchasers of voting trust certificates did not purchase the *legal title* to shares or certificates of stock and they did not purchase the right to receive shares or certificates of *stock,* because all of the stock was subject to the voting trust agreement under the

terms of which legal title to the stock could not be sold or transferred by the voting trustees.

Counsel for Appellant in his brief attempts to emphasize that there was a transfer of the right to receive because the voting trust certificates entitled the holder thereof to receive the certificates of stock at the expiration of the voting trust (Appellant's brief 23, 24). Appellee concedes that if the voting trust agreement expired and the voting trust certificate holders desired to transfer their voting trust certificates for shares of stock there would be a transfer tax upon the transfer of stock from the voting trustees to the voting trust certificate holders. However, this transaction, as it here occurred, and even though the voting trust certificate holders had the right to receive stock at the expiration of the voting trust agreement, there was no transfer by the voting trust certificate holder to the voting trustees of the *right to receive* such stock. The *right to receive* any stock at the expiration of the voting trust agreement was a right which the voting trust certificate holder retained and did not transfer except when he transferred his voting trust certificate to some other person.

The erroneous tax in this instance, apparently results by reason of the fact that the original investigating field agents of the Commissioner of Internal Revenue either did not fully understand the facts of the transaction or did not fully understand the limitations of the Revenue Statutes. The investigating officers were Oscar B. Gingrich whom the evidence

shows is now deceased and L. D. Courtright. The Defendant did not account for Mr. Courtright except by the statement that they did not know where he is, but offered no testimony to show that they had made any effort to locate him or have him appear as a witness before the court either in person or by deposition (R. 187, 188). Plaintiff's Exhibit 20 is a copy of the report made by these investigating officers and with relation to the 155,000 shares they reported to the Commissioner that "an additional 155,000 shares were transferred to the voting trust making a total of 505,000 shares held by the Trustees." The Commissioner examining such a report would undoubtedly come to the conclusion that there was a *transfer of shares* to the voting trust and a tax would necessarily be assessed upon such a statement. However, the actual facts of the transaction disclose that the statement of the field agents in their report, was not true but that there was only an *issuance* of the additional 155,000 shares to the voting trust (upon which an issuance tax has been paid), but that there was no *transfer* of these shares to the voting trust.

Under the facts before the Court in this case there have been only two cases decided which have a bearing upon facts similar to those of this case, where voting trust certificates were sold by voting trustees, as distinguished from a transaction where *shares of stock* have been *issued* and then *transferred* to voting trustees. The first of these cases is Consolidated Equities, Inc., vs. White, 7 Fed. Supp. 851, first de-

cided in the District Court of Massachusetts. The opinion, being very brief, is as follows:

> "The Plaintiff paid a stamp tax on alleged transfer of shares in corporations whose liabilities it had assumed which it now seeks to recover as unlawfully exacted. The occasion for the asserted tax is due to transactions of which the following summary may be said to be typical:
>
> Brokers offered for sale voting trust certificates representing shares in an investment corporation at a stated price. A customer electing to purchase sent the purchase price to the broker who, in turn, paid it to the corporation, whereupon the corporation issued shares to voting trustees who thereupon instructed the transfer agent to issue to the purchaser voting trust certificates for the number of shares purchased and paid for. The stamp tax on the issue was paid, as also were stamp taxes on transfers where the voting trust certificate was originally issued to the broker and later divided among its customers. The details of the transactions are more fully set forth in requests for findings.
>
> It is obvious that what the customer of the broker purchased and what he received was a certificate representing a beneficial interest in stock which had been originally issued to voting trustees to hold for the benefit of the subscriber. This transaction involved no transfer of legal title to the shares, nor to any right to such legal title either from purchasers to

trustees or from trustees to purchasers. If the theory of the government that the purchaser became a shareholder by virtue of his payment to the broker of the purchase price be adopted, the voting trustees held the stock for the sole benefit of the purchaser and purchaser's interest was represented, and intended to be represented, by the voting trust certificate. No transfer, actual or constructive, from the purchaser was necessary to vest the legal title in the voting trustees. Union Trust Co. of Pittsburgh vs. Heiner (D. C.) 26 F. (2d) 391.

I rule, therefore, that the transfer tax was unlawfully exacted, and that the Plaintiff is entitled to recover in this action.

Judgment for the Plaintiff may be entered for $6,674.88, with interest thereon."

This case was appealed to the Circuit Court of Appeals for the First Circuit and reported as White vs. Consolidated Equities, 78 Fed. (2d) 435.

The Court in its decision on appeal pointed out as follows:

"All the transactions appear to have been made upon form contracts which appear in the record. These contracts and the recitals of fact in the bill of exceptions fully support the findings and rulings of the District Judge. He found, on the collector's request, that the brokers 'entered into an agreement with the voting trustees and United Equities, Inc. (one of the corporations concerned) to secure subscriptions for voting-trust certificates, repre-

senting shares of United Equities, Inc., at the price of $100 per share' (italics supplied); and that the brokers 'proceeded to obtain subscriptions for voting-trust certificates.' The facts stated show that the purchasers did not come into contact with the corporations and made no contracts representing these shares except through the brokers. It is true, as the collector contends, that in matters of this sort the statute required that substance rather than form shall be considered, and that 'all transfers of legal title to shares or certificates whether technical sales or not' are taxable (Provost vs. U. S., 269 U. S. 443, 458, 46 S. Ct. 152, 155, 70 L. Ed. 352; Goodyear Co., vs. U. S., 273 U. S. 100, 47 S. Ct., 263, 71 L. Ed. 558); but this does not warrant imputing to transactions a character substantially different from what they in fact were in order to make them taxable. In the cases relied on by the collector there was an acquisition of the shares, or of the right to them, by the purchaser which was transferred to other parties. Consolidated Equities vs. White (D. C.) 9 F. Supp. 145. Each case depends on its own facts. In the one before us the purchasers did not contract for the shares and consequently never transferred them or any right to them. See Shreveport-El Dorado Pipe Line Co. vs. McGrawl (C. C. A.) 63 F. (2d) 202; Union Trust Co. vs. Heiner (D. C.) 26 F. (2d) 391. The judgment of the District Court is affirmed with costs."

The other case is Corporation of America vs. McLaughlin, decided by this Court on November 22, 1938, 100 Fed. (2d) 72. In that case the Court pointed out that the purchasers had no opportunity to subscribe for the stock but only had a right to subscribe to a beneficial interest and they could not have acquired a right to anything else and that they were never offered the right to pay for the stock and have it issued to them. The Court, in its opinion, stated:

> "It is apparent that the beneficiaries of the trust of the corporation's shares were offered nothing more than the right to acquire more equities and not the right to acquire the legal title to stock which they in turn transferred to the trustees. True, the beneficiary's payment of the consideration is a sine qua non of the transaction, but the causa causans, the generating cause, of taxability—the existence of a right in the payer of the consideration to receve the stock and its subsequent transfer—here did not exist***
>
> "Very frankly the subscribers were told, that Giannini had created a status in which 'the payment of your consideration gives you nothing but a right to obtain, in the future, certain stock of the corporation which cannot be exercised by you until the Giannini trust is dissolved.' It seems clear that this is a case where the commissioner is claiming a tax on a transfer from the beneficiary of a right to receive shares of stock, where the beneficiary

> came into such a right only through the trust and still has the right to receive them.
>
> "The words of the statute taxing 'transfers of the legal title *** to rights *** to subscribe for or to receive shares' of a corporation cannot be interpreted to mean creation of an equitable right to receive shares at the termination of a trust in which they are held, with the deliberate intent that the beneficiaries shall not receive them until the trust is terminated. There appears no ambiguity in the statute from which any other interpretation may be chosen. If there were such an ambiguity White vs. Aronson, 302 U. S. 16, 20, 58 S. Ct. 95, 82 L. Ed. 20, requires its determination in favor of the taxpayer."

The Appellee in this case also contends that the corporation against which the tax was assessed was not a party to the voting trust agreement and had no part in the issuance or transfer of voting trust certificates. The voting trust was entirely separate from the corporation, and the voting trustees or their agents made their own contacts with the trust certificate holders and issued its own voting trust certificates through the medium of its own agent, Title and Trust Company of Portland. It is the further contention of the Appellee that even though the statutes were broad enough to include a tax upon the transfer of the right to receive a beneficial interest, such a tax could not be imposed upon the corporation who had no part in the issuance or transfer of voting trust certificates,

but such a tax could only be imposed upon either the voting trustees or upon the purchasers or holders of voting trust certificates. A tax can not be collected from a person or corporation who had no part in the transaction. This was emphasized in the case of United States vs. Revere Copper and Brass Company, United States Disrtict Court, Northern District, New York, decided February 4, 1938, (not reported) but may be found in Commerce Clearing House Federal Tax Service for 1938, Volume 4, Page 9622, Paragraph 9173 where the United States was attempting to collect, through the medium of the Court, a tax on the transfer of certain capital stock from one stockholder to another by transfers in which the corporation had no part. The Court held that the tax could not be imposed upon the corporation unless it had some part in the transfer.

In view of the foregoing we submit that the findings of fact and conclusions of law of the District Court in this case were in conformity with the evidence and that there was a correct application of the statutes as construed by the decisions and that there was no taxable transfer on the 155,000 shares, and that no such tax could be imposed on the corporation.

II.

A stamp tax is not payable upon an original issue of voting trust certificates and is not payable in respect of the right to receive voting trust certificates.

It appears that the Appellant does not cover in his brief all of the items which were at issue before the District Court or upon which the District Court made findings. We are assuming, therefore, that the Appellant is only raising questions on appeal on the three items discussed in his brief.

The second item in Appellant's brief pertains to what he terms a transfer of the right to receive voting trust certificates. This specifically refers to items 14 and 15 shown in the analysis attached to Plaintiff's complaint (R. 10). It is further set forth in Plaintiff's complaint in the analysis of voting trust certificates (R. 14-24), being specifically those certificates which are designated in the trust certificate books as "original issue." Prior to June 21, 1932, the tax was computed at the rate of two cents under the 1926 Act and thereafter at the rate of four cents under the rate provided by the 1932 amendment. The original investigating officers in their report to the commissioner (Plaintiff's Exhibit 20), did not specifically recite any facts relative to these certificates but merely made the statement upon which the commissioner assessed his tax that "to date there has been transferred to the trustees 505,000 shares, and there has been issued trust certificates amounting to 496,-

787 shares." The transfer to the trustees of the original 349,995 shares was taxed at $70.00. There is no dispute over that tax. The additional 155,000 shares were never transferred to the trustees; they were *issued* to the trustees and have been discussed heretofore. In addition to these taxes which were paid on the issuance, the commissioner has taxed each individual voting trust certificate at the rate in effect at the time of the issuance of each certificate. This is directly contrary to the statute and regulations. The statute makes no mention of any tax upon the original issuance of voting trust certificates and under regulations 71, Article 29, sub-division (e) it is proclaimed that the issue of voting trust certificates is not subject to tax. The reason for such a regulation is obvious in view of the fact that the statute only attempts to place a tax upon the transfer of *legal tile* as distinguished from the *equitable title.* The Appellee here claims that the additional tax assessed on each of the certificates which are designated as "original issue" in the records of the voting trust certificates should be refunded to the Appellee. Part of the tax on original issues has been refunded, to-wit: On certificates Nos. 294 to 314, inclusive, and certificates 228 to 334, inclusive. In fact the commissioner, in his letter to Portland Associates, Inc., dated February 18, 1937, and the explanations attached thereto (Defendant's Exhibit 13), shows with relation to said item 14 that this was a "tax assessed with respect to the original issue of voting trust certificates. The original issue

of voting trust certificates is not taxable (Article 29 (e), Regulations 71). In other words, the commissioner recognized that the amount should have been refunded and he did refund a part thereof but failed to make a refund on the additional amount which was collected on account of original issues of voting trust certificates.

The Counsel for Appellant in his brief claims that this tax is based upon the right to receive voting trust certificates. He admits on Page 37 of his brief that these individuals had not deposited with the trustees of the voting trust, any of the shares represented by the voting trust certificates. This is obviously another attempt on the part of the Appellant to try to make, for the parties herein, a transaction which was entirely different from what actually transpired. In other words, the tax is being based upon a theoretical transaction, which the commissioner probably hoped had taken place, or that the commissioner is attempting to suggest that the transaction should have been handled in accordance with his theoretical transaction. We know of no decisions in American Courts which undertake to tell individuals how their transactions should be made so long as one does not act in violation of the laws or regulations of the constituted authorities. In this instance the commissioner is attempting to *theoretically make* a transaction whereby a tax would be imposed three times where there was only one taxable transaction. The only taxable transaction, so far as this corporation is con-

cerned was the issuance of the capital stock to the voting trustees, upon which the tax has been paid. The commissioner would go further and attempt to say that there was a subsequent transaction on the right to receive stock (which has been heretofore discussed), and a further transaction on the right to receive voting trust certificates, neither of the latter having actually been in the minds of the parties at the time of the transactions, and neither of them having actually taken place. None of the parties were mislead by the simple transaction of the trustees receiving the capital stock and the selling and issuing of voting trust certificates to those persons who subscribed for or purchased voting trust certificates. The voting trust certificate holders knew what they were buying, and got what they bought, and under such a transaction there was no transfer of the right to receive voting trust certificates. See Corporation of America vs. McLaughlin, 100 Fed. (2d) 72.

If Congress had intended that there should be a transfer tax on the right to receive voting trust certificates they certainly would have taken occasion to include in the statute a specific provision covering the transfer of the right to receive the voting trust certificates. They did not do this but limited the statute very plainly to transfers of *legal title* to *shares* of *stock* in a corporation or some similar association. In addition to that, the corporation against which the tax is assessed in this instance had no part in the issuance of voting trust certficates and was

not a party to any of the transactions between the voting trustees and the holders of the voting trust certificates.

We therefore submit that there was no transfer of the right to receive voting trust certificates and even if there had been, that the revenue statutes do not impose any tax on the transfer of the *right* to *receive voting trust certificates* and that the District Court was correct in his findings and conclusion upon this point.

III.

That the giving of an option to purchase stock is not subject to stamp tax.

The so called options referred to in this case are found in Plaintiff's Exhibit 1, being the minute book of the corporation on pages 41 to 49, inclusive. They are merely recitations in the minutes of the corporation, that certain persons have the right to purchase certain amounts of capital stock on or before July 31, 1932. These resolutions were adopted on January 27, 1932, and a tax of four cents per share was assessed against the same but at the time of the trial the Appellant conceded that even if a tax could be assessed thereon, it would only be at the rate of two cents per share for the reason that the 1932 amendment had not been passed or become effective in January of 1932, and the Appellant concedes that the

Appellee is entitled to recover in any event on this item, the sum of $700.00 (R. 181).

In view of the fact that the only evidence of these purported options is a resolution in the minutes of the corporation, it is doubtful if they rise to the dignity of being options. In any event the testimony clearly shows that there was no money ever paid by the individuals mentioned in the resolutions on account of the stock mentioned in the resolutions (R. 120). The recitation was made in the minutes for the reason as explained by Mr. Franklin T. Griffith (R. 139) that no criticisms would result from the purchase of stock by those who might be considered as "insiders," the purpose of the resolution being merely to fix a purchase price on the stock which was the market price at that particular time. This merely indicated good faith on the part of those individuals in fixing a price equal to the price for which the stock could be purchased by anyone on the open market. It is further pointed out in the testimony that the loans made by individuals at about the same time were all subsequently repaid by the corporation (R. 14) and that no consideration was ever paid for the purported options and no stock or trust certificates were ever delivered to any of the individuals by reason of said resolution (R. 120, 142).

The Court below held that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option.

The transaction took place in the State of Oregon

and if these resolutions are to be considered options we feel they would be governed by the ordinary definitions and rulings relative to options, by the Oregon Supreme Court.

We submit that an option is merely an offer and does not ripen into a contract until the consideration is paid or the privilege is exercised. In other words, an option is nothing more than the right to exercise a privilege. 55 C. J. 107, Section 68, states as follows:

> "An option, as used in the law of sales, is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or on compliance with certain terms and conditions; or which gives to the owner of the property the right to sell or demand sale. It is also sometimes called a 'refusal,' or an 'unaccepted offer.' It is not a contract for the purchase or sale of property, and does not transfer, nor agree to transfer, any title to, or interest in, the subject matter to the optionee, but is merely a contract by which the owner of property gives the optionee the right or privilege of accepting the offer and buying the property on certain terms, provided he acts within the proper time and manner; and until the option is exercised the delivery of the goods to the optionee is a mere bailment."

The Appellant relies strongly upon the case of Treat vs. White 181 U. S. 264 which does not relate

to an option but relates to a "call." The Court will observe in that case that there was a definite executed agreement made in bearer form and signed by the party to be charged, which in effect was a negotiable instrument passing by delivery. It was not an option but a definite agreement to sell and it is significant that under Regulations 71, Article 35, Sub-division (p) it is specifically provided that "a 'call' is an agreement to sell and is taxable." An option, however, is not an agreement to sell. It is merely the right to exercise a privilege.

It appears that the courts have never had occasion to pass upon the taxability of an option, under the revenue statutes providing for documentary stamps on issues and transfers of capital stock. The reason no such cases have arisen is undoubtedly due to the fact that the statute makes no provision for the taxing of options and if Congress had desired to impose a tax upon options they certainly would have included a specific provision therefor, in the taxing statute.

However, the Supreme Court of Pennsylvania in the case of Hughes vs. Antill, 23 Pa. Supreme Court 290, 95 considered the subject of taxability of an option. From the record it appeared that on August 31, 1899, Harvey Antill and his wife executed in duplicate an option to sell coal to J. S. White, his heirs and assigns. J. S. White assigned and transferred the option. The Court said

> "Neither the contract nor the assignment belonged to the class of instruments which, by

> the act of Congress of June 13, 1898, required an internal revenue stamp. Such stamps were necessary only on instruments conveying an interest or title, while in the present case the contract vested and the assignment transferred no present interest or title, but merely a conditional right to demand a conveyance within the time limited."

Furthermore, in the case of Hopwood vs. McCausland, 120 Iowa 218, 94 N. W. 469, the Court said:

> "An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. Warvelle on Vendors (2d Ed.) Sec. 125."

The Supreme Court of Oregon has several times expressed itself on the question of options. In the case of Clarno vs. Grayson, 30 Or. 111, 123, 46 Pac. 426, the Court said:

> "But if the right acquired by the terms of the contract is simply a privilege or an option, or a right to acquire a right, or an interest in the subject-matter of the contract, it is then not a question of the forfeiture of any vested right in the property, or a divestiture of title, whether termed equitable or legal, but a question of the enforcement or non-enforcement of a stipulated personal right or privilege. The privilege of acquiring a vested equitable right

must be distinguished from the right. The privilege is acquired directly by the contract, but the acquisition of the right, while it is stipulated for under its terms, is dependent upon the performance of a condition. When such a condition is performed, the right vests, and not until then: Richardson vs. Hardwick, 106 U. S. 254 (1 Sup. Ct. 213)."

Also, in the case of Kingsley vs. Kressly, 60 Or. 167, 173, 111 Pac. 385, 118 Pac. 678, the Court said:

"1, 2. The contract by its terms is an option. For the consideration of $2,000 paid, plaintiff granted to defendants, until April 15, 1909, the exclusive and irrevocable privilege to purchase the land. It was unilateral until accepted by defendants on that day. Until then they were in no way obligated to buy, and it was not a contract of sale. Plaintiff was bound by his offer, during the time specified, that he was not at liberty to withdraw it; there being a consideration paid for it. It is true the $2,000 was to constitute a part of the purchase price, if the sale was completed, but that sum was plaintiff's money in either case. But, to have the option culminate in a contract of sale, defendants must have accepted it within the time specified, and the acceptance was to be evidenced by the payment of the $18,000 on April 15, 1909. House vs. Jackson, 24 Or. 89 (32 Pac. 1027); Clarno vs. Grayson, 30 Or. 111; 120 (46 Pac. 426); Friendly vs. Elwert, 57, Or. 599 (112 Pac. 1065). Until that should be done, defendants would acquire no right

> in the property, except that if they entered into possession they would not be trespassers while they complied with the conditions of the agreement. Their right to possession was no more than a contingent license."

In the case of Leadbetter vs. Price, 103 Or. 222, 234, 202 Pac. 104, the Court had under consideration certain options relative to corporation stock. In its opinion the Court said:

> "To turn the option contract of April 1, 1910, into a contract binding Pittock to sell and Leadbetter to buy, it was incumbent upon Leadbetter to make a timely election to buy: James on Option Contracts, Secs. 801, 813; Pollock vs. Brookover, 60 W. Va. 75 (53 S. E. 795, 6 L. R. A. (N. S.) 403, and case note).
>
> "Election by the optionee must strictly conform to the terms of the offer contained in the option and must be unequivocal, absolute and unconditional; Friendly vs. Elwert, 57 Or. 599, 610 (105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913 A, 357); James on Options, Sec. 837.
>
> "It is only after the optionee has made an election under the terms of the option agreement, and within the time limited thereby, or by the law, where no time limit is fixed by the agreement, that an executory contract of sale results, of whch a court of equity will require the specific performance.
>
> "The particular act or acts which constitute an election may be fixed by the terms of the op-

tion, such as payment of the price, in which case payment of the price is made a condition precedent to the exercise of the right to buy, and the money must be paid or tendered, and a mere notice of intention to buy, or that the optionee will take the property does not change the relation of the parties and does not raise a binding promise upon the part of the optionor: Clarno vs. Grayson, 30 Or. 111, 142 (46 Pac. 426); Kingsley vs. Kressly, 60 Or. 167, 173 (111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746); Davis vs. Brigham, 56 Or. 41, 47 (107 Pac. 961, Ann. Cas. 1912B, 1340); Killough vs. Lee, 2 Tex. Civ. App. 260 (21 S. W. 970); Winders vs. Kenan, 161 N. C. 628 (77 S. E. 687); James on Option contracts, Secs. 816, 817, 914, 924.

In Herndon vs. Armstrong, 148 Or. 602, 608, 36 Pac. (2d) 184, 38 Pac. (2d) 44, the Court said:

> "Options to purchase real estate are merely offers to sell property and until acceptance and their conditions unconditionally performed, they confer no title to the realty. To develop an offer into a contract requires its acceptance in precise terms: Strong vs. Moore, 105 Or. 12 (207) P. 179, 23 A. L. R. 1217): Strong vs. Moore, 118 Or. 649 (245 P. 505); Wetherby vs. Griswold, 75 Or. 468 (147 P. 388). An option to purchase real estate does not pass to the optionee any interest in the land, but a contract of sale does transfer to the vendee an interest in the land and therefore a person appearing in the character of an optionee pos-

> sesses nothing except the right to buy and he has no interest in the land unless by his acceptance of the option he transfers the option into a contract of sale and changes his character from that of optionee to that of vendee: Strong vs. Moore, 105 Or. 12 (207 P. 179, 23 A. L. R. 1217); Leadbetter vs. Price, 103 Or. 222 (202 P. 104); Richanbach vs. Ruby, 127 Or. 612 (271 P. 600, 61 A. L. R. 1441)."

From the foregoing citations it is very clear that if the resolutions as recited in the minutes of the corporation should be considered as options there would not be any such transfers of *legal title* to stock in a corporation which would make them subject to a transfer tax under the statutes. It appears that an option is not an agreement to sell and it does not embody the right to receive. An option is nothing more than an offer to sell and the optionee can not change it into a contract to sell unless he accepts it in the exact terms of the offer, and he does not have any right to receive any property under the option until he accepts the option by complying with the terms thereof. In other words if the resolutions set forth in the minutes of the corporation in this case were to ripen into contracts or were to place the so called optionees in a position where they had the right to receive anything, they would first have to be accepted by the individuals Griffith, Battleson and Stock by some sort of acceptance. However, the testimony conclusively shows, as heretofore pointed

out, that there was no acceptance, that there was no agreement between the corporation and the parties in writing to buy the stock, that nothing was paid for the stock and that the stock or any part thereof, was never issued or delivered. The resolutions did not give the individuals the right to receive but gave them nothing more than the right to exercise a privilege.

The term "option" is fully defined in 46 C. J. 1122, 1123, as follows:

> "A term variously defined as meaning alternative; choice; election; liberty to elect between alternatives; power of choosing; power or right of election; preference; privilege; right of choice between two things; courses, or propositions; right of choice or election; right of election to exercise privilege; right, power, or liberty of choosing; right, power, or liberty to elect between alternatives; right to choose between one or two or more alternatives; wish."

The Court will clearly see that an option does not carry with it any right to receive but it is merely the right to make an election or the right to exercise a privilege and we submit that the revenue statutes do not go so far as to either directly tax an option or do they attempt in any manner to tax the right to make an election or the right to exercise a privilege. It is also significant if not conclusive, that the regulations promulgated under the statute make no attempt whatever to impose a tax upon options and the utter silence of the regulations should be sufficient to in-

dicate that Congress never intended to impose any tax upon options. It is to be noted that the tax upon the so called options was taxed as a *transfer.* At the time of these resolutions the corporation owned no treasury stock and the stock covered by the resolutions had never been issued. If the position of the Appellant is correct on taxability of options, this would not be a transfer tax but an issuance tax and the resolutions themselves would be nothing more in any event, even under the Appellant's contentions, than a right to subscribe for stock in the corporation. Under Regulations 71, Article 29, sub-division (c), it is pointed out that: "The issue of 'rights' to subscribe for stock evidenced by warrants," is not taxable.

We therefore submit that the purported options were not any transfers of legal title and were not subject to taxation under the statute.

CONCLUSION

We respectfully submit that the findings of fact and the judgment of the District Court in this case was correct and should be examined and a judgment entered for the Appellee, together with interest thereon from the date of the judgment and Appellee's costs and disbursements on appeal.

Respectfully submitted,

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(October, 1939)

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—Stamp Taxes

Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum parchment, or paper upon which such instruments, matters or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

SCHEDULE A.—STAMP TAXES

2. Capital stock (and similar interests) issue: On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned

or described in this subdivision or subdivision 1 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this Act), on each $100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents: Provided, that where such shares or certificates are issued without par or face value, the tax shall be 10 cents per share (corporate share, or investment trust or other organization share as the case may be) unless the actual value is in excess of $100 per share, in which case the tax shall be 10 cents on each $100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than $100 per share, in which case the tax shall be 2 cents on each $20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued).

* * * * *

3. Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of

transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued), 4 cents, and where such shares or certificates are without par or face value, the tax shall be 4 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be): Provided, that in case the selling price, if any, is $20 or more per share the above rate shall be 5 cents instead of 4 cents.

Treasury Regulations 71.

Art. 29. Issues Not Subject to Tax.—The following are examples of issues not subject to the tax:

(a) The issue of stock by domestic building and loan associations, substantially all the business of which is confined to making loans to members, or by mutual ditch or irrigation companies.

(b) The issue of stock by Federal land banks.

(c) The issue of "rights" to subscribe for stock evidenced by warrants.

(d) The issue of new certificates of stock to reflect a mere change in the name of the issuing corporation.

(e) The issue of voting-trust certificates.

(f) The issue, upon a merger of corporations,

of certificates of stock of the same kind by the continuing corporation to its former stockholders in substitution for the old certificates of stock.

(g) The issue of certificates of stock in exchange for outstanding certificates for the purpose of splitting up a certificate for a number of shares into two or more certificates for a smaller number of shares of the same kind of stock, where there is no change in legal title or in the total amount of such stock issued.

(h) The issue of definitive certificates of stock in exchange for temporary or interim certificates upon which the tax has been paid.

(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise.

(j) The issue of stock by a farmers' or fruit growers' or like association organized and operated on a cooperative basis, but only if such association is within the class of organizations exempt from taxation under section 231 (12) of the Revenue Act of 1926.

Art. 34. Sales or Transfers Subject to Tax.—The following are examples of transactions subject to the tax:

(a) The sale or transfer of shares of stock, whether or not represented by certificates.

(b) The transfer of stock to or by trustees.

(c) The transfer of voting trust certificates.

(d) The sale or transfer of temporary or interim certificates.

(e) The sale or transfer of certificates or shares representing beneficial interests in an association. See article 125 (1) (d).

(f) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(g) The transfer of the right to subscribe for stock, whether or not evidenced by warrants.

(h) The transfer of the right to receive a stock dividend already declared.

(i) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(j) The sale or transfer of stock, made by a broker, directly or indirectly, for himself.

(k) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(l) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(m) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(n) The transfer of stock by an administrator or executor to the legatee or distributee.

(o) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(p) The sale or transfer within the territorial jurisdiction of the United States, of stock of a foregn corporation.

(q) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, such a transfer being effected by the act of the parties and not wholly by operation of law.

(s) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(t) Transfer of legal title to stock irrespective of whether or not the transferee receives any beneficial interest therein, except as provided in article 35 (k).

(u) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(v) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

(w) Loans of shares or certificates of stock, including intra-office borrowings.

Art. 35. Sales or Transfers Not Subject to Tax.—The following are examples of transactions not subject to the tax:

(a) The transfer of stock pursuant to a sale,

where the previous memorandum of sale has been duly stamped.

(b) The sale or transfer of enemy-owned stock in American corporations to or by the Alien Property Custodian.

(c) The surrender of certificates in exchange for other certificates representing the same or new stock, provided they are issued to the same holders.

(d) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.

(e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporations.

(f) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of legal title.

(g) The transfer of stock from the decedent to the administrator or executor of the estate.

(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law.

(i) An agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actual-

ly sold and the delivery or transfer for such purpose of the certificates so deposited; but the person making a transfer of such certificates shall make and sign a statement of the facts and attach it to the certificate.

(j) The return of stock loaned; but the person making the transfer of the stock returned shall make and sign a statement of the facts and attach it to the certificate.

(k) Deliveries or transfers from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if such shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such fiduciary, or from the nominee to such fiduciary, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts.

(l) The transfer or delivery of certificates to a clearing house for the sole purpose of clearing or adjusting accounts, where no beneficial interest is vested in such clearing house and there has been no change of title or interest.

(m) The mere delivery of a certificate of stock by or on behalf of a customer to his broker solely for the purpose of enabling such broker to make a sale thereof for the customer, where the broker has no ownership or interest therein, is not subject to stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of the owner thereof to the name of a broker, solely for the purpose of enabling such broker to make a sale

thereof for the owner, is not subject to tax, provided the broker shall in every case, at the time of such transfer to him, make and sign a certificate stating that he has no ownership in such stock and that the transfer to him was made solely to enable him to sell the stock for the owner. Such certificate shall in every case be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for the transfer and shall be preserved, together with the old certificate, by such transfer agent, for not less than four years, for the inspection of the revenue officer.

(n) The mere delivery of a certificate of stock from a broker to his customer for whom he has purchased such certificate, where such broker has no ownership or interest therein, is not subject to the stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of a broker to the name of his customer for whom and upon whose order he has purchased such stock, where the tax has been paid upon the transfer of the stock of the broker, is not subject to tax, provided that the broker shall in every case, at the time of such transfer from him, make and sign a certificate stating that the transfer from the broker to his customer is made solely to complete the purchase made by such broker for such customer. Such certificate in every case shall be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer, and shall be preserved, together with the old

certificate, by such transfer agent for not less than four years, for the inspection of the revenue officer.

(o) The certificates required by the two preceding paragraphs shall be in the following form:

(1) (In the case of a transfer to a broker): We hereby certify that we have no ownership or interest in * * * shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

.....

(Broker sign here)

(2) (In the case of a transfer by a broker): We hereby certify that the transfer of * * * of the within shares to the names indicated by the star is made solely to complete the purchase made by us for our customer, and we have no ownership or interest therein.

.....

(Broker sign here)

No broker who has filed a certificate on the form prescribed under (1) shall file a certificate on the form prescribed under (2) with relation to the same transfer of shares of stock.

(p) A "call" is an agreement to sell and is taxable; but a transfer of a certificate of stock pursuant to the "call" is not taxable, being only a fulfillment of the original agreement. The Seller shall execute and attach to the certificate of stock his certificate, which shall be accepted by the transfer agent and shall be preserved by

him for not less than four years for inspection of the revenue officer. The certificate here prescribed shall be in the following form:

We hereby certify that the transfer of..... shares of the within stock to..... has been made pursuant to a "call," and that the Federal stock transfer stamps for the transaction are affixed to such "call," which is in our possession.

(q) Where, under paragraph (m) of this article, a certificate of stock standing either in the name of the owner or any other person has been delivered by the owner thereof to a broker for sale, and subsequently, under paragraph (n) of this article, such certificate has been delivered by a broker to his customer for whom it is purchased and the tax has been paid upon the delivery of such certificate from the seller's broker to the buyer's broker, the transfer of such certificate of stock into the name of the buyer is not subject to tax. However, either requisite stamps shall have been affixed to the certificate of stock upon its delivery to the buyer's broker or the memorandum of sale evidencing the transaction between the seller's broker and the buyer's broker, with the requisite stamps affixed thereto, shall have been attached to such certificate at such time and presented to the transfer agent at the time such certificate is surrendered for transfer. The old certificate, together with the memorandum of sale, if used, shall be preserved for not less than four years

by such transfer agent for the inspection of the revenue officer.

(r) Transfer of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

(s) Where trustees hold as joint tenants, upon the death of one title devolves upon the survivor. Such devolution constitutes a transfer by operation of law not subject to tax.

(t) Transfer of stock from maiden name to married name of stockholder.

M.U